Supreme Court, U.S.
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No. _____

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

PRESLEY L. PIPPIN, JR.,
Petitioner

v.

ELLEN GAIL BENNETT,
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the nexus analysis used by the Fifth Circuit Court of Appeals is appropriate to determine whether an action was taken under color of law pursuant to 42 U.S.C. §1983.

2. Whether the right to due process under the Fifth Amendment to the United States Constitution is violated in a damage suit prosecuted under 42 U.S.C. §1983, when, on the morning of trial, the District Court, without prior notice, reinstates long-since dismissed official capacity claims against a defendant, and then insists throughout trial that his attorneys, over their repeated objections that they cannot do so, represent the defendant in both his individual and official capacities, despite conflicts of interest between those two positions.

3. Whether a federal civil litigant is deprived of due process under the Fifth Amendment to the United States Constitution when the trial court shows bias and prejudice against the defendant that affected the outcome throughout the bench trial of the damage suit case.

4. Whether attorneys' fees and expenses awarded to Respondent impermissibly amounted to a windfall for Respondent.

PARTIES TO THE PROCEEDING

The Petitioner is Presley L. Pippin, Jr. The Respondent is Ellen Gail Bennett.

PARTIES TO THE PROCEEDING IN THE COURT OF APPEALS

The names of all parties to the proceedings before the United States Court of Appeals for the Fifth Circuit are as follows:

(1) Presley L. Pippin, Jr., who is the Petitioner and who was Appellant in the Fifth Circuit.

(2) Ellen Gail Bennett, who is the Respondent and who was Appellee in the Fifth Circuit.

(3) Archer County, Texas, who is not a party to this proceeding but who was an Appellant in the Fifth Circuit by virtue of Petitioner being sued in his official capacity under 42 U.S.C. §1983.

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPINIONS BY OTHER COURTS IN THIS CASE

The opinions by other Courts in this case have either been published and reported in the official reports or are unpublished. These opinions are listed in the Appendix as set forth below:

(1) The opinion of the United States Court of Appeals for the Fifth Circuit. See, Ellen Gail Bennett, Plaintiff/Appellee v. Presley Pippin, Jr, Individually and as Sheriff of Archer County, in his official capacity (as Sheriff of Archer County, in his official capacity deleted as per Order dated 11/16/92 - leaving Presley Pippin Jr Individually as dft)(Presley Pippins Jr, [sic.] as Sheriff of Archer County, in his official capacity, reinstates as per oral order of Judge Joe Kendall during non-jury trial 2/10/95) Defendant/Appellant and Archer County, Texas, Movant/Appellant, No.

95-10380 (5th Cir., January 24, 1996, Opinion) [Appendix A]; Bennett v. Pippin, 74 F.3d 578 (5th Cir. 1996).

(2) The Opinion of the United States Court of Appeals for the Fifth Circuit on Petitioner for Rehearing. See, Ellen Gail Bennett, Plaintiff/Appellee v. Presley Pippin, Jr, Individually and as Sheriff of Archer County, in his official capacity (as Sheriff of Archer County, in his official capacity deleted as per Order dated 11/16/92 - leaving Presley Pippin Jr Individually as dft)(Presley Pippins Jr, [sic.] as Sheriff of Archer County, in his official capacity, reinstates as per oral order of Judge Joe Kendall during non-jury trial 2/10/95) Defendant/Appellant and Archer County, Texas, Movant/Appellant, No. 95-10380, (5th Cir. Unpublished Opinion, March 1, 1996) [Appendix B].

(3) The Order denying individual Defendant's Motion to Vacate Judgment, and for New Trial, United States District Court, Northern District of Texas, Wichita Falls Division, Honorable Judge Joe Kendall. See, Ellen Gail Bennett v. Presley Pippin, Jr., Individually And In His Official Capacity As Archer County Sheriff, Civil Action Number 7:92-CV-98-X (N.D. Tex. April 3, 1995) [Appendix C].

(4) The Order modifying judgment, United States District Court, Northern District of Texas, Wichita Falls Division, Honorable Judge Joe Kendall. See, Ellen Gail Bennett v. Presley Pippin, Jr., Individually And In His Official Capacity As Archer County Sheriff, Civil Action Number 7:92-CV-98-X (N.D. Tex. April 12, 1995) [Appendix D].

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(6) Findings of Fact and Conclusions of Law of the United States District Court for the Northern District of Texas, Wichita Falls Division, Honorable Judge Joe Kendall. See, Ellen Gail Bennett v. Presley Pippin, Jr., Individually And As Sheriff For Archer County, Texas, In His Official Capacity, Civil Action Number 7:92-CV-098-X (N.D. Tex. February 27, 1995) [Appendix F].

(7) Order Awarding Attorneys' Fees And Expenses, Northern District of Texas, Wichita Falls Division, Honorable Judge Joe Kendall. See, Ellen Gail Bennett v. Presley Pippin, Jr., Individually And As Sheriff Of Archer County, Texas, In His Official Capacity, Civil Action Number 7:92-CV-098-X (N.D. April 13, 1995) [Appendix G].

(8) Order Denying Archer County, Texas', Motion For A New Trial, Northern District of Texas, Wichita Falls Division, Honorable Judge Joe Kendall. See, Ellen Gail Bennett v. Presley Pippin, Jr., Individually And In His Official Capacity As Archer County Sheriff, Civil Action Number 7:92-CV-98-X (N.D. Tex. April 3, 1995) [Appendix H].

(9) Order Denying Official Defendant's Motion for New Trial, United States District Court, Northern District of Texas, Wichita Falls Division, Honorable Judge Joe Kendall. See, Ellen Gail Bennett v. Presley Pippin, Jr., Individually And In His Official Capac-

ity As Archer County Sheriff, Civil Action Number 7:92-CV-98-X (N.D. Tex. April 3, 1995) [Appendix I].

(10) Order Denying In Part And Granting In Part Defendant's Motion to Dismiss, Ellen Gail Bennett v. Presley Pippin, Jr., Individually And As Sheriff Of Archer County, In His Official Capacity, Civil Action Number 7:92-CV-098-X (N.D. Tex. November 16, 1992) [Appendix J].

JURISDICTION OF THIS COURT

The opinion of the United States Court of Appeals for the Fifth Circuit was entered on January 24, 1996. The Fifth Circuit denied a timely Petition For Rehearing on March 1, 1996.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The constitutional and statutory provisions involved in this case are as follows:

> (1) "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity,

> or other proper proceeding for redress."

42 U.S.C. § 1983.

> (2) "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

U.S. Constitutional Amendment V.

The jurisdiction of the District Court was invoked under the Federal Civil Rights Act, 42 U.S.C. §1983 and under 28 U.S.C. §1331 (general federal question jurisdiction).

STATEMENT OF THE CASE

On July 2, 1990, the Wichita Falls Police Department received a call from a woman, later identified as Ellen Gail Bennett,[1] stating that she had shot her ex-husband, Tony Bennett. (Tr. Vol. IV, PP. 190-191). After transporting Bennett to the Wichita Falls Police Department, the officers discovered that the shooting had actually occurred in Archer County, not Wichita County, Texas (Tr. Vol. IV, P. 199), thereby giving jurisdiction of the investigation to the Archer County, Texas, Sheriff's Department. Presley Pippin, Jr., Sheriff of Archer County,[2] radioed that he would come to Wichita Falls to take custody of Bennett. (Tr. I, 200-201, 217). At about 11:00 P.M., Pippin arrived in Wichita Falls. This was the first time he had seen Bennett. (Tr. II, 23, 25). Pippin read Bennett her Miranda warnings and questioned her about the shooting. (Tr. II, 32). Pippin explained to Bennett that he was not going to put her under arrest at that point, that an investigation would be conducted into the shooting, and that she would be afforded the opportunity to make a statement. (Tr. II, 35-36). Pippin then drove Bennett to the crime scene, where he turned her over to Deputy Sheriff Kurt Berryman. (Tr. II, 24). These events were Pippin's only official involvement in the investigation of the shooting. Enroute, Pippin stopped and purchased cigarettes for Bennett after she requested a cigarette, and Bennett touched Pippin in a familiar fashion. (Tr. V, 77).

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[1]Hereinafter also referred to as simply "Bennett" or "Respondent."

[2]Hereinafter also referred to as simply "Pippin," "Sheriff," or "Petitioner."

At no time was Bennett either handcuffed or placed under arrest.

Other deputies sheriff were at the scene of the shooting when Bennett and Pippin arrived. (Tr. V, 29). The Sheriff left soon thereafter, and Deputy Berryman, who was in charge of the investigation, drove Bennett to the Archer County Sheriff's Department, where she gave a statement. (Tr. V, 24, 39). Pippin was not present when Bennett gave her statement. (Tr. V, 39; IV, 209). The Sheriff later stopped by the hospital and determined that Tony Bennett's condition was stable (Tr. V, 24, 39-40). After checking on a grass fire in Archer County (Tr. V, 24, 40), Pippin decided to return to Bennett's home to check on her welfare, since she had earlier expressed concern that her ex-husband's friends or family might retaliate against her. (Tr. V, 43-44, 161). Here, the testimony of the parties diverges.

According to Bennett, Pippin was waiting for her in the driveway of her home and motioned for her to come into the driveway. (Tr. I, 115-116). She testified that Pippin led her to believe this questioning was part of the investigation and that she felt compelled to answer. (Tr. I, 117-119). According to Bennett, at some point during Pippin's questioning, Pippin touched her in a way that made her feel uncomfortable. Id. She says she told Pippin she was tired and would prefer to answer any further questions in the morning. (Tr. I, 120). She says they stood up, and Pippin walked off the porch; she walked back into the house; Pippin was in the front yard; and she went to bed. (Tr. I, 120-121). She testified that sometime later, she awoke to find Pippin standing over her bed, naked. (Tr. I, 123). Bennett testified that Pippin then

had sex with her, while she resisted. (Tr. I, 126-127). Bennett stated that during her resistance, Pippin said he could do whatever he wanted to do, that he was the Sheriff (Tr. I, 124-125) and further said, "What are you complaining about? I could have just thrown you in jail and sorted it out later." (Tr. I, 161).

According to Pippin, when he visited Bennett that evening, Bennett met him at the door and let him in. (Tr. V, 79). The two sat on the back porch and discussed personal matters and drank coffee. (Tr. V, 79-80, 146). While still on the back porch, Pippin helped Bennett remove her boots and then massaged her feet. (Tr. V, 82-83). According to Pippin, he suggested that they have sex, and the two adjourned to the bedroom. (Tr. V, 83). Once there, they engaged in light foreplay and kissing and had sex. (Tr. V, 122). Pippin then left the residence at approximately 4:00 A.M.

It is undisputed that the grand jury later no-billed Bennett for the charge of attempted murder of her husband, following which Bennett for the first time alleged that Pippin had sexually assaulted her. After hearing the testimony of both Bennett and Pippin, the grand jury later no-billed Pippin on Bennett's sexual assault allegation.

Bennett filed suit against Pippin, in his (1) individual capacity and in his (2) official capacity as Sheriff of Archer County, Texas, for civil rights violations pursuant to 42 U.S.C. §1983. Bennett alleged that the Sheriff, under color of law, sexually assaulted her while she was a suspect in a shooting case.

The United States District Court for the Northern District of Texas - Wichita Falls Division - on November 16, 1992, granted in part Pippin's motion to dismiss pursuant to Rule 12(b)(6) by dismissing all claims asserted against Pippin in his official capacity (R. 105-108)[3]. Over two years later and on the very morning of trial, February 10, 1995, a different Judge in the District Court vacated its prior Order and reinstated all official capacity claims against Pippin. (Tr. IV, 1-30)[4]. The case was tried to the bench on two successive Fridays, February 10 and 17, 1995. The District Court ruled from the bench at the close of trial on February 17, 1995, that Pippin was liable in his individual and official capacities (Tr. V, 200-203). The Court awarded actual damages in the amount of $1,000,000.00 and punitive damages in the amount of $1,000,000.00. (R. 494). Judgment was entered in Bennett's favor against Pippin in his individual and official capacities on February 27, 1995. The District Court later granted Plaintiff's motion for attorneys' fees and expenses, totaling $133,235.58. (R. 729). Archer County then moved to intervene, which the Court denied. (R. 552, 695). Both Archer County and Sheriff Pippin moved that the trial court vacate its Judgment and grant a new trial. (R. 531, 592). On April 3, 1995, these motions also were all denied. (R. 694, 696, 697).

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[3]"R" refers to the Record of the United States Court of Appeals, Fifth Circuit.

[4]"Tr." refers to the transcribed testimony of the bench trial, on record with the United States Court of Appeals for the Fifth Circuit.

On April 28, 1995, May 2, 1995, and May 5, 1995, Pippin timely filed his Notice of Appeal, First Amended Notice of Appeal and Second Amended Notice of Appeal from the Judgment of the District Court. The Opinion of the United States Court of Appeals for the Fifth Circuit was entered on January 24, 1996. See Bennett v. Pippin, 74 F.3d 578 (5th Cir. 1996). In that Opinion, the Fifth Circuit held that Pippin had acted under color of state law in violating Bennett's civil rights and was liable in his individual capacity to Bennett. However, the Fifth Circuit reversed as to Pippin in his official capacity or Archer County, finding that Archer County was deprived of its right to a jury trial when the District Court made it a defendant on the morning of trial. The Fifth Circuit denied a timely Petition for Rehearing on March 1, 1996.

REASONS FOR GRANTING THE WRIT

(A) "Color Of Law"

The Fifth Circuit in this case, based on its recent en banc decision in Doe v. Taylor Independent School District, 15 F.3d 443 (5th Cir. 1994) (en banc), cert. denied, Lankford v. Doe, 115 S.Ct. 70 (1994), held that (1) Pippin's actions, as a Sheriff of a Texas county, "were an abuse of power held uniquely because of a state position"; and (2) an "explicit invocation of governmental authority constituted a real nexus between the duties of Sheriff and the rape." Bennett v. Pippin, 74 F.3d 578, 589 (5th Cir. 1996). [Appendix A]. Relying on an erroneous interpretation of the Tenth Circuit's "nexus" test in D.T. By M.T. v. Independent School District No. 16, 894 F.2d 1176 (10th Cir. 1990), the Fifth Circuit's new standard for a finding of "color of law"

in a factual scenario involving a law enforcement officer is contrary to this Court's own precedent and has not been followed by any other circuit in the nation. In fact, the Fifth Circuit's standard is unique, having no basis in any prior opinions by any of the Circuits in the nation.

In any civil rights action under 42 U.S.C. §1983, a plaintiff has the burden to establish, among other things, proof of two indispensable elements: (1) that he or she was deprived of a right or interest secured by the Constitution and laws of the United States, and (2) that the deprivation occurred under "color of state law." West v. Akins, 487 U.S. 42, 48 (1988). While clear precedent exists for guidelines in determining whether a constitutional violation has occurred in a case, a specific standard for determining when an individual has acted under color of state law has been proven to be an elusive one. The concept was defined by the Court in two cases decided in the same decade. In United States v. Classic, 313 U.S. 299, 326 (1941), the Court held,

> "Misuse of power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken under color of state law."

In Screws v. United States, 325 U.S. 91, 111 (1944), the Court affirmed the holding of Classic, but stressed that "under color of law" means "under pretense of law." The Court explained that, "Acts of police officers who undertake to perform their official duties are included whether they hew to the line of authority or overstep it." Id., at 111. However, "acts of officers in the ambit of their personal pursuits are plainly excluded." Id., at 111.

Until Doe v. Taylor, Id., the Fifth Circuit had steadfastly adhered to these guidelines for determinations of the color of state law element of §1983 causes of action against law enforcement officials. In Delcambre v. Delcambre, 635 F.2d 407 (5th Cir. 1981), the Fifth Circuit held that the defendant police officer was not acting under color of state law, and thus not liable under §1983, when he assaulted his sister-in-law on the premises of the municipal police station while on duty following an argument, during which the sister-in-law was neither arrested nor threatened with arrest. The Fifth Circuit in United States v. Tarpley, 945 F.2d 806, 809 (5th Cir. 1991), held that the defendant police officer acted under color of law for an assault of an individual in his home, because he used a service weapon; he identified himself as a police officer; he requested assistance from another officer whom he identified to the victim as a fellow officer; and he claimed special authority for his actions by virtue of his official status, all of which created an environment in which the "air of official authority pervaded the entire incident."

As shown by these pre-Doe Fifth Circuit cases, determination of the color of law elements for §1983 necessarily is a fact-intensive inquiry. In those situations where law enforcement officers engage in a purely-personal pursuit (like sex), no bright line exists in making the determination. The Second Circuit, in Pitchell v. Callan, 13 F.3d 545, 548 (2nd Cir. 1994), summarizes the problem:

> "However, while it is clear that 'personal pursuits' of police officers do not give rise to §1983 liability, there is no bright line test for dis-

> tinguishing 'personal pursuit' from activities taken under color of law."
>
> "More is required than a simple determination as to whether an officer was on or off duty when the challenged incident occurred . . . in short, courts look to the nature of the officer's act, not simply his duty status."

It is clear that the other Circuits in the nation are in agreement that the nature of the act performed is controlling in determining whether an officer, either on or off duty, is acting under color of law. United States v. Tarpley, Id.,; Revene v. Charles County Commissioners, 882 F.2d 870, 872 (4th Cir. 1989) ("the nature of the act performed is controlling"); Gibson v. Chicago, 910 F.2d 1510, 1517 (7th Cir. 1990) (". . . the essential inquiry becomes whether [the officer's] . . . actions related in some way to the performance of police duty"), and Stengel v. Belcher, 522 F.2d 438 (6th Cir. 1975), cert. granted, 425 U.S. 910, cert. dism'd., as improvidently granted, 429 U.S. 118 (1976) (holding that the nature of the actions performed controlled, and not the clothing of the actor or the status of being on-duty or off-duty). Analysis of the nature of the acts performed by the defendant law enforcement officer is necessary, because otherwise a §1983 action could lie against an entity for every intentional tort committed by an official who happened to be employed by that entity, a result that has been clearly rejected by the Court in Parratt v. Taylor, 451 U.S. 527, 544 (1981), wherein it was stated, in relevant part, that, "Such reasoning would make the Fourteenth Amendment a font of tort law to be superimposed upon what other systems may already be administered by the states."

See also, Baker v. McCollan, 443 U.S. 137, 146 (1979).

Beginning with Doe v. Taylor, Id., a case in which six Fifth Circuit Judges dissented regarding specifically the "color of state law" analysis of the majority, the Fifth Circuit adopted a new and unique standard for determining "color of state law", that was and is contrary to both Supreme Court precedent and the case law established by the other federal circuits. In Doe, the Fifth Circuit held that the defendant, a high school coach, violated 42 U.S.C. §1983 when he had a sexual relationship with a fifteen-year old student in his biology class. The Fifth Circuit, in holding that the defendant acted under color of law, relied significantly on D.T. By M.T. v. I.S.D. Id., when it stated:

> "As the Court in D.T. recognized, if a "real nexus" exists between the activity out of which the violation occurs and the teacher's duties and obligations as a teacher, then the teacher's conduct is taken under color of state law . . ."

Doe, 15 F.3d at 442, f.n. 4.

Two glaring problems exist with the Fifth Circuit's reliance on D.T. First, the Fifth Circuit misconstrued the "real nexus" standard discussed in the Tenth Circuit's opinion. D.T. is a case in which a teacher molested three students during the summer while engaged in a fundraising campaign for a basketball camp. The school argued successfully that color of state law did not exist for the plaintiff's §1983 cause of action, because the fundraising activity was not a school program but rather was organized as a community volunteer effort. The

Tenth Circuit described the "real nexus" test as follows:

> "In other words, it is the obligation of the plaintiff to prove that there exists a direct nexus between the constitutional torts (here the acts of sexual molestation . . .) and the School District's authorization or approval thereof, either expressly or otherwise . . ."

D.T., 894 F.2d at 1187. Clearly, this test, requiring an authorization or approval by the governmental entity of the individual's acts made the basis of the lawsuit, is a much higher standard of proof than the Fifth Circuit's interpretation of it, requiring simply a connection between the alleged violation and the defendant's duties.

Second, a closer examination of the Fifth Circuit's "real nexus" test reflects that the Fifth Circuit is essentially embracing a standard for "color of state law" that requires very little connection between the alleged violation and the duties of the defendant official. The Fifth Circuit in Doe believed that the defendant there took advantage of his position as teacher and coach to seduce the student by giving her good grades, while requiring her to do little or no work and while urging one of the student's other teachers to raise her grade in another class. Further, the Fifth Circuit emphasized that physical contact with the student occurred, at times, on school grounds or after school events. 15 F.3d at 452, f.n. 4. Yet, as pointed out by the dissent, the only activity that was under color of law was when the defendant caused the student to develop a crush on him; the sexual abuse, was not under color of state law, because it came later, not

during school hours, not as part of a school activity, and not as a part of any exchange of favors between the defendant and the student. 15 F.3d at 468. The only "real nexus" for color of law in Doe was between the physical conduct made the basis of the lawsuit and the defendant-teacher's status simply as the student's teacher and coach.

In the present case, the Fifth Circuit, in line with Doe's "real nexus" test, based its holding that "color of state law" existed for Bennett's §1983 cause of action on four sets of the District Court's factual findings: (1) Pippin questioned Bennett about the earlier shooting for thirty to forty-five minutes as the two sat on her porch, just before the rape occurred; (2) In response to Bennett's refusal to have sex, Pippin said, "I can do what I want, I'm the Sheriff"; (3) Pippin used his authority as Sheriff to determine if Bennett's husband would be released from the hospital that same night; and (4) Bennett needed Pippin's permission to retrieve her pickup truck and to change her place of residence.[5] Further, the Fifth Circuit, in agreement with the District Court, commented,

> "It was not lost on Gail Bennett (or the Sheriff) that the Sheriff carried the keys to the Archer County Jail with him in his pocket . . ." (Id., at 589).

But for the Fifth Circuit's erroneous reliance on Doe's misinterpretation of the "real nexus" test, none of these factual findings, singularly or in combination,

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[5]The first two factual findings are from Bennett's testimony and are disputed by Petitioner. Bennett, 74 F.3d at 589.

would constitute "color of state law", as defined by Supreme Court precedent and the case law of the other Circuits.

First, the record evidence concerning the first finding by the Court is not that Pippin ever told Bennett that he was questioning her as part of an attempted murder investigation. Bennett's own testimony was that Pippin led her to believe this questioning was part of the investigation and that she felt compelled to answer. (Tr. I, 117-119). Yet, federal law is clear that a victim's objective reaction is irrelevant in determining whether an officer acted under color of law when performing an act. Pitchell, 13 F.3d at 548-49.

Second, Bennett's contention that Pippin stated he could do what he wanted - he was the sheriff - is insufficient to establish that Pippin had misused any of his duties as a sheriff. Remarks about an officer's status alone are insufficient to establish color of state law when the activity concerns only an officer's private pursuit. Varna v. City of Perth Amboy, 42 F.3d 809 (3rd Cir. 1994) (holding that two officers who assaulted an individual were not acting under color of law, since the incident was a personal dispute, irrespective of one officer's remark to the individual before the assault, "I'll show you jurisdiction.")

Fourth, according to Bennett's own testimony, deputies informed her that she should not leave Archer County without the permission of Pippin, subsequent to her arrest and well before the time when Pippin visited her at her home that night. (Tr. I, 113, 202-203). Her contention that Wichita Falls Police Department personnel told her they could not release her truck without the

Sheriff's permission was an event that allegedly occurred, according to Bennett's own testimony, the day after the Sheriff's evening visit to her home. Both alleged events are immaterial to the issue of whether Pippin acted under color of law when he had sex with Bennett at her ex-husband's house, on the previous evening.

Even accepting all other testimony of Bennett regarding the night in question as true for sake of argument only, the facts under pre-Doe cases and Supreme Court precedent do not establish the necessary element of "color of state law" for a cause of action under 42 U.S.C. §1983. According to Bennett herself, at some point during her conversation with Pippin that evening, she told Pippin she was tired and would prefer to answer any further questions in the morning. (Tr. I, 120). She testified that they stood up; Pippin walked off the porch and into the yard; and she walked back in the house and went to bed. (Tr. I, 120-121). According to Bennett, the next thing she remembered was that Pippin was standing over her in her bedroom without any clothes on. (Tr. I, 122-123). She contended Pippin had sex with her, while she was trying to stop him. (Tr. I, 124-125). That version by Bennett reflects no law enforcement activity as well as no "real nexus" between his law enforcement duties and any personal or private pursuit, of which sex is certainly one that can only be personal in nature.

Bennett's own testimony, if believed, would indicate that Pippin left her house that evening and subsequently re-entered without her knowledge or permission. Clearly, under Bennett's own view, Pippin would be violating Texas criminal law by unlawfully entering and then would be violating Texas criminal law by forced sex, in effect

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allegations of two separate felonies. The Fifth Circuit's holding that these alleged actions constituted color of state law is in direct conflict with this Court's own holding in Barney v. City Of New York, 193 U.S. 430, 437 (1904) that state action does not exist when the act complained of "was not only not authorized, but was forbidden by [state] legislation." See also, Doe, 15 F.3d at 481 (Garza J., dissenting). These alleged actions certainly do not show misuse of any power possessed by virtue of state law as required by Classic, but reflect, instead, under Bennett's own theory, actions by Pippin in his personal pursuit, which are excluded from color of state law. Screws, Id.

In sum, in this case, the Fifth Circuit erroneously relied on a simplistic "real nexus" test, announced by it first in Doe and originating from a misinterpretation of D.T., holding that color of state law existed based simply on Pippin's status as a Sheriff and the fact that the sex occurred at Bennett's home in the Sheriff's jurisdiction. Such an extremely weak and tenuous connection between the act made the basis of the lawsuit and the duties of Pippin is insufficient under §1983 for color of state law to exist. The Fifth Circuit now permits in Doe and in this case that very situation which this Court rejected in Parratt, whereby now §1983 actions may lie against an entity for every intentional tort allegedly committed by an official who happened to be employed by that entity. This type of unfair expansion of 42 U.S.C. §1983 should be struck down by this Court.

(B) Denial Of Due Process Regarding District Court's Order

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It is well established that civil litigants in federal court share equally the protections of the Fifth Amendment's Due Process Clause. Green v. Bock Laundry Machine Company, 490 U.S. 504 (1989). The purpose of the jury trial in federal civil cases is to assure a fair and equitable resolution of factual issues. Gasoline Products Co. v. Champlin Co., 283 U.S. 494 (1931).

In the present case, the Fifth Circuit deprived Pippin of due process by approving the District Court's reviving, on the very morning of trial, of claims against Pippin in his official capacity and insisting that Pippin's counsel proceed on behalf of Pippin in his official capacity, that is, on behalf of Archer County, Texas, at the same time that they already were representing Pippin in his individual capacity, all starting on the morning of the trial, itself. The District Court repeatedly insisted then and throughout trial that Pippin's counsel represented Pippin in both his individual and official capacities, despite which Pippin's counsel maintained they represented Pippin only in his individual capacity, while counsel for Pippin in his individual capacity pointed out the inevitable conflict in representing Pippin in both capacities, Bennett, 74 F.3d at 582 - a disqualifying conflict of the very type which the Fifth Circuit had decried fifteen years earlier in Van Ooteghen v. Gray, 628 F.2d 488 (5th Cir. 1980). Nevertheless, the District Court insisted otherwise. See, transcript of District Court's oral orders [Appendix K].

The Fifth Circuit approved the District Court's indiscriminate invasion of the attorney-client relationship when it forced Pippin's counsel to proceed ostensibly on behalf of Pippin in his official capacity,

which effectively forced Pippin's lawyers simultaneously to represent Archer County, with all of the inevitable and continual distractions which inevitably imposed on counsel in their having to evaluate every question, every answer, every objection, every argument, every witness, every item of evidence, and every position not only as it impacts the representation of one party but also and overwhelmingly as it impacts each of the two parties separately and whose interests are inconsistent and whose liability positions are not always aligned - the very dilemma which the Fifth Circuit long ago decried in Van Ooteghen v. Gray, Id., and the very dilemma which necessarily makes effective representation of two parties with competing interests by the same lawyers impossible.

The parameters of the attorney-client relationship are governed by state law. Hopper v. Frank, 16 F.3d 92, 95 (5th Cir. 1994). Under Texas law, the matter is one of contract, which requires that there be a meeting of the minds. Terrell v. State, 891 S.W.2d 307 (Tex.App.--El Paso 1994, writ ref'd.); Yakin v. Glusing, Sharpe & Kruger, 875 S.W.2d 381 (Tex.App.--Corpus Christi 1994, no writ). Since Pippin's counsel were unable to confer with Archer County, such a meeting of the minds was impossible. In fact, when the County Commissioners were able to consider and vote on the matter, they unambiguously decided that Mr. Ludlum's joint representation of the County and Pippin was not in the County's best interest. (R. 584-591). The District Court had no authority to interfere in the relationship between Mr. Ludlum and his client. Brooks v. State, 854 S.W.2d 659 (Tex.App.--Dallas 1992, no writ).

As the Fifth Circuit noted in Van Ooteghen v. Gray, Id., one practical effect of Monell v. New York City Dept. of Social Services, 436 U.S. 658 (1978) (holding that a local governmental unit is a "person" for the purposes of 42 U.S.C. §1983) is that a conflict arises from a single attorney's representation of a government official in all capacities. 628 F.2d at 495, f.n. 7. Despite Mr. Ludlum's repeated objections, the District Court ignored the obvious and blatant conflict and forced the parties to trial, potentially requiring defense counsel to violate their ethical obligation to avoid conflicts of interest that inevitably compromise the interests of both "represented" parties. Requiring defense counsel to represent Pippin in all capacities would have prevented counsel from a free and unfettered defense of both Pippin and Archer County. In short, the District Court placed defense counsel in an untenable and impossible position, abrogating Pippin's due process right to a fair trial.

A reversal and a remand for a new trial of the claims asserted against Pippin in his official capacity (and, hence, Archer County) does absolutely nothing whatsoever to cure the compromise of the full, free, unfettered and fully-effective representation to which Pippin was and is entitled and of which he, thus far, has been judicially deprived - contrary to every notion of sound ethics and due process of law.

(C) Denial Of Due Process Regarding District Court's Comments

As stated, civil litigants in federal court can expect the protections of the due process clause of the Fifth Amendment. Green, Id.

A basic tenet of American jurisprudence is that a defendant is entitled to a fair and impartial fact finder, whether it be the jury or the bench. Montiel v. City Of Los Angeles, 2 F.3d 335 (9th Cir. 1993). A litigant is entitled to a trial before a judge "not biased against him at any point of the trial." United States v. Holland, 655 F.2d 44, 47 (5th Cir., Unit B, 1981), quoting United States v. Thompson, 483 F.2d 527, 529 (3rd Cir. 1973). Such, of necessity, means a decision formed on the basis of the evidence, not a predisposition about the case or about either party.

In the case at bar, the Fifth Circuit deprived Pippin of due process by refusing to reverse the judgment of the District Court, although the District Court clearly demonstrated throughout the trial of the case his strong bias personally against Pippin and in favor of Bennett, as the record amply demonstrates. This bias was evidenced by the District Court's slant in its active involvement in questioning the witnesses, rephrasing questions, interrupting examination of witnesses, and sidebar comments.

For example, when defense counsel inquired of Bennett concerning her own misguided purpose and motive of currying favor with Pippin as part of her own strategy to avoid being charged with or indicted for shooting her ex-husband, "Isn't it true that you were in fact buying some insurance to be sure that you had someone on your side in Archer County while the investigation was ongoing?" (Tr. Vol. IV, P. 182), the District Court interrupted cross-examination and asked Bennett if she had "bribed the Sheriff with sex?" (Tr. Vol. IV, P. 182). The District Court's gross misstatement of counsel's cross-examination reflects the

District Court's early predisposition against Pippin, and it undermined the effectiveness of cross-examination by potentially scaring the witness off from answering the more innocuous question that she was actually asked.

The District Court's bias arose possibly from his unknown experience as a police officer with the Dallas Police Department, a large urban organization. This bias surfaced early in the trial, when the Court reassured Bennett's counsel, "I don't need to listen to this. Trust me. You don't know me, but this is not the first time I had to make a call on who to believe or not." (Tr. Vol. IV, PP. 73-74). The trial judge was also suspicious of Pippin going to the scene of the shooting even though he was not the investigating officer. (Tr. Vol. IV, PP. 220). Finally, the District Court emphasized his law enforcement experience at the close of trial:

> [T]he judgment I'm going to render I render not merely as a federal judge .... It's not that I'm totally ignorant of law enforcement officers, because for five and a half years in my young life, I was one. That was the first job I ever had was a Dallas police officer, so I have arrested and investigated calls before, and I think I have a fairly good feel for -- more so than many sitting in my position, of what sheriffs and law enforcement officers go through. (Tr. Vol. V, PP. 200-201).

Apparently, Judge Kendall drew on his own experience in urban law enforcement, rather than impartially considering the evidence

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and testimony regarding a small rural sheriff's department employing only six deputies, or just his own notions from his own experience. (Tr. Vol. IV, PP. 219). Most importantly, the District Court allowed his own experience as an urban police officer to cloud his impartiality, preventing Pippin from receiving a fair trial.

This predisposition was reinforced at the close of trial, when the District Court repeatedly referred to the proceedings as a TV movie, "The Return To Macon County." (Tr. Vol. V, PP. 197-202). The District Court also quipped, "This docket is not a boring one." (Tr. Vol. V, P. 176). Similarly, the District Court actively cross-examined defense witness Etta Payton, questioning her veracity on the stand, in sharp contrast to the District Court's comparatively-mild inquiries of Bennett and other witnesses called by her counsel. Perhaps the most flagrant example of the District Court's prejudice is the District Court's statement, "About all I can say is I've been to three goat ropings at [sic] the County Fair and I don't think I've ever seen a deal like this one." (Tr. Vol. V, P. 200).

If, on the other hand, the District Court was meaning, as the Fifth Circuit suggested in divining the mental processes of the trial judge, to quip, during trial, then the result of such misplaced conduct leads to the same conclusion: Pippin was denied a fair and impartial trial. Not only were the "quips" of the trial court not directed to some innocuous bit of testimony or evidence, but also and moreover they were directed to the whole case. Litigation is serious and litigants have rights, starting with the right to a fair and impartial trial. Humor is necessary. It has its many proper places. The courtroom in circum-

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stances like these is certainly not one of them, but the "quips" were revealing in their own right in exposing judicial predisposition in this case, as the humor was not neutral. Moreover, Pippin is entitled - at least - to a fair trial, rather than one like the very untypical conduct of the trial court in this case.

The foregoing comments and the conduct of the Court during examination of witnesses were unnecessary but on the record, do, nevertheless, clearly reflect the District Court's predisposition, bias and prejudice against Pippin, which precluded Pippin from receiving a fair trial throughout and further deprived him in all capacities of due process of law. See, Liteky v. United States, 127 L.Ed.2d 474 (1994).

(D) Attorneys' Fees And Expenses Awarded To Respondent Improperly Calculated

The Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C. §1988, authorizes District Courts to award reasonable attorney's fees to prevailing parties in §1983 cases. The Act's intent was for fee awards to not produce windfalls to attorneys. Riverside v. Rivera, 477 U.S. 561 (1986). The standards for awarding fees under §1988 are tied directly to Fifth Circuit precedent. As stated by the Court in Riverside,

> "While the statute itself does not explain what constitutes a reasonable fee, both the House and Senate Reports accompanying §1988 expressly endorsed the analysis set forth in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974)."

477 U.S. at 567. Johnson identifies twelve factors to be considered in calculating a reasonable attorney's fee. 488 F.2d at 717-719.

The Fifth Circuit has condensed the Johnson factors to a four-part framework first enunciated in Copper Liquor, Inc. v. Adolph Coors, 684 F.2d 1087, 1092 (5th Cir. 1982):

> (1) Ascertain the nature and extent of the services supplied by the attorney;
>
> (2) Value of the service according to the customary fee and quality of the legal work; and
>
> (3) Adjust the compensation on the basis of the other Johnson factors that may be of significance in the particular case. Nisby v. Commissioners Court of Jefferson County, 798 F.2d 134, 136 (5th Cir. 1986), quoting Copper Liquor.

A District Court must consider all the Johnson factors in making an attorney's fee award. Cobb v. Miller, 818 F.2d 1227, 1232 (5th Cir. 1987). In the case at bar, the Fifth Circuit's Opinion contravenes both Riverside, and Copper Liquor by refusing to reverse the District Court's award of attorneys' fees and expenses when the District Court failed to set forth the grounds for its fee award, falling far short of the standards.

The initial determination in considering an application for attorney's fees under §1988 is to multiply the reasonable time expended on the case by a reasonable hourly

rate. This results in a "lodestar". The lodestar may then be adjusted in light of other relevant Johnson factors. Cobb, 818 F.2d at 1231.

In her motion for attorney's fees, Bennett did not fully address the Johnson factors and did not provide adequate information to allow the Court to determine the lodestar. For example, neither Mr. Tuddenham nor Mr. Kolker, counsel for Bennett, gave any opinion as to the difficulty of the case, the success achieved, the "undesirability" of the case, the nature and length of their professional relationship with Bennett, awards in similar cases, and the time limitations imposed. In addition, neither attorney addressed whether he was precluded from accepting other cases because of his participation in this case. Finally, while Bennett's counsel included information regarding other contested fee awards, they did not state whether these fee awards were in civil rights cases.

Bennett's counsel claimed to have incurred a combined total of 552.94 hours for their time and 37.3 hours for their paralegals' time. Bennett requested an award of an hourly rate of $225 per hour for attorneys' time expended and $50 per hour for the paralegals' time expended. Not only is the hourly rate exorbitant, but Bennett's counsel inflated their fees after trial. (R. 708, 718). Further, Bennett's counsel spent far in excess of a reasonable amount of time in the preparation and prosecution of this case.

Bennett's counsel claimed to have extensive experience in civil rights cases, thereby justifying their hourly rate of $225.00. However, in this case, Bennett's counsel expended 43.25 hours in legal re-

search concerning claims asserted against Pippin. These charges are both unreasonable and exorbitant, especially in light of Mr. Tuddenham's and Mr. Kolker's alleged experience in civil rights cases.

Of the total research time, 32.5 hours was expended by law clerks. Yet, nowhere in the documentation provided by Plaintiff's counsel is the nature of this significant amount of research specified. Rather, Plaintiff seeks recovery for a single block of thirty hours of time.

In fact, all of the foregoing factors indicate that a downward adjustment of the lodestar amount is appropriate. First, the case is not factually difficult, consisting of a single incident which was tried to the bench in two days. The Fifth Circuit considered this factor in Blanchard v. Bergeron, 893 F.2d 87 (5th Cir. 1990) in deciding that the plaintiff's request for over 385 hours of legal time for a case consuming less than three days of trial, that was not legally or factually difficult, and which included only two defendants by the time the case reached trial, was not a reasonable expenditure of time. The Blanchard Court also noted that the plaintiff requested four times as much as the defense counsel charged for the case.

The case at bar presented a similar scenario since the case was tried in two days and involved only two individual defendants. The case could have been prepared much more efficiently. The fees awarded amounted to a windfall.

Finally, any award of attorney's fees under Section 1988 is addressed to the Court's sound discretion. Lewis v. Kendrick, 944 F.2d 949, 954 (1st Cir. 1991).

There is no requirement that the Court award all the fees requested by the plaintiff, or indeed, that the Court award any part of the fees requested. In light of the fact that Bennett's request for attorney's fees did not include several factors considered relevant and necessary by the Johnson Court, the Court should vacate the District Court's award of attorneys' fees.

The Fifth Circuit's Opinion refusing to vacate the District Court's award of attorneys' fees should be reversed.

CONCLUSION

The petition for writ of certiorari should be granted and the judgments of the Fifth Circuit and the district court, as to Pippin in his individual capacity, should be reversed and a new trial granted.

Respectfully submitted,

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